Supreme Court, U. S.
FILED
FEB 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1116

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ROBERT EARL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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The District Attorney of Queens County in the City of New York on behalf of the People of the State of New York petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

Opinions Below

There is no written opinion by the Supreme Court of the State of New York, Queens County. The order of the Supreme Court of the State of New York is set forth in

Appendix A. The majority and dissenting opinions of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, are reported at 50 A.D.2d 289, 377 N.Y.S.2d 649, and are set forth in Appendix B. The decision of the Court of Appeals of the State of New York is reported at 40 N.Y. 2d 941 and is set forth in Appendix C.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on November 18, 1976, and is set forth in Appendix D. The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1257 (3).

Questions Presented

1. Whether an investigatory seizure of a person by a police officer who draws his gun before there is probable cause to arrest constitutes an illegal arrest in violation of the Fourth Amendment made applicable to the States by the Fourteenth Amendment?

2. Whether a gun voluntarily displayed by a person who is seized by a police officer must be excluded from evidence if the seizure of that person violated the Fourth Amendment made applicable to the States by the Fourteenth Amendment?

Constitutional Provisions Involved

1. The Fourth Amendment to the United States Constitution which provides:

> The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Robert Earl was convicted on October 9, 1974, in the Supreme Court of the State of New York, Queens County, of the crime of possession of weapons and dangerous instruments and appliances as a misdemeanor upon a plea of guilty entered after his motion to suppress physical evidence was denied (see Appendix B, p. A2). The motion to suppress evidence was made pursuant to New York Criminal Procedure Law §710.30(1) which provides for a motion by a defendant to suppress "tangible property obtained by means of an unlawful search and seizure under

circumstances precluding admissibility thereof in a criminal action against such defendant." This motion, which was denied following a hearing on September 9, 1974 (Appendix A), raised the Federal questions herein sought to be reviewed in the court of first instance.

On December 29, 1975, the Appellate Division of the State of New York, Second Judicial Department, with one justice dissenting, affirmed the judgment of the lower court, including the decision denying the motion to suppress physical evidence which raised the Federal questions herein sought to be reviewed (Appendix B).[1]

The Appellate Division, based on the testimony at the hearing held on the defendant's motion to suppress physical evidence, found that on September 13, 1970, shortly after midnight, Jesse Carter, an off-duty New York City Housing Authority Police Officer, while driving home from the movies in his private car with a female companion, saw two men crouched behind a car in a partly deserted unfenced parking lot in the South Jamaica section of Queens County in New York City. The officer pulled into the parking lot, turned off the lights, parked his car two car lengths away from the two men and observed them for a "brief moment." The men were crouched behind a car adjacent to the officer's car and he saw that one of them, Robert Earl, was holding an object in his upraised hands while the other man was putting something from his hand into his rear pants pocket, although he could not identify the objects. Officer Carter turned the headlights of his car back on and drove around toward the two men. He stopped his car, got out facing the men with his pistol in his hand and said, "Freeze—police officer." Earl came up from the crouched position and dropped the object he had been holding. The officer told the men to put their hands up on the car and retrieved the object, a loaded handgun. He then informed them they were under arrest and searched them. Robert Earl had six more bullets in his pocket and the other man had a second handgun (Appendix B, pp. A3, A10-11).[2]

1. New York Criminal Procedure Law §710.70(2) provides that:

"An order finally denying a motion to suppress evidence may be reviewed upon appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty."

In an opinion by Mr. Justice M. Henry Martuscello, the majority at the Appellate Division stated that while the conduct observed by the officer was admittedly equivocal, and hence capable of innocent interpretation, it was precisely the sort of suspicious street conduct which should be investigated, and found that the "officer, by reason of the hour, the location, and the nature of the activity observed came to harbor a 'founded suspicion' that criminal activity was afoot, and acted reasonably to test that suspicion." The majority concluded "that under the circumstances of this case, the 'seizure' was reasonable within the meaning of the Fourth Amendment" and that by drawing his weapon because of the element of danger, the officer did not convert an otherwise lawful detention into an illegal arrest for they did not "believe that the Fourth Amendment's proscription against unreasonable searches and seizures require[d] officers in Carter's stead to risk their lives needlessly in the performance of their duty" (Appendix B, pp. A3-9).

2. The Appellate Division of the State of New York may review questions of law and issues of fact. N.Y. Crim. Proc. Law §470.15 (McKinney 1971).

The dissenting justice, Hon. J. Irwin Shapiro, was of the view that Robert Earl was under arrest at the moment the officer pointed his gun at him and ordered him to freeze, "a moment when the police officer as yet had no probable cause to believe a crime was being committed." He found that "Patrolman Carter had neither probable cause nor a founded suspicion of criminal activity afoot when he seized the defendant" and stated that "constitutionally protected Fourth Amendment rights cannot be dispensed with solely because the results of an unreasonable search and seizure, made without probable cause, demonstrate that the person whose constitutional rights have been infringed was, in fact, armed with illegal weapons." Justice Shapiro then concluded that his duty "to support and defend the Constitution" made it necessary for him to vote to suppress the product of the seizure and

search (Appendix B, pp. A9-17).

The New York Court of Appeals, in a decision dated November 18, 1976, with two justices dissenting, reversed the order of the Appellate Division and dismissed the indictment on the dissenting opinion at the Appellate Division. The two dissenting justices voted to affirm on the majority opinion at the Appellate Division (Appendix C).[3]

Reasons for Granting the Writ

This case presents two important and related questions concerning the right of an officer to make an investigative seizure of a person with gun drawn without probable cause

3. The jurisdiction of the New York Court of Appeals in non-capital cases is limited to questions of law. N.Y. Const., Art. 6, §3 (McKinney 1969).

to arrest. The first question deals with the constitutionality of such a seizure. The second is whether a gun which was displayed by the person thus seized must be excluded from evidence if the seizure was unreasonable. The decision of the New York Court of Appeals should be reviewed by this Court because it determines these important questions of Federal constitutional law in a manner which probably conflicts with the applicable decisions of this Court.

1. The New York Court of Appeals in our view erroneously adopted the dissenting opinion of the Appellate Division and held, as a matter of law, that the momentary seizure of Robert Earl by the police officer with gun drawn before there was probable cause to arrest violated constitutionally protected Fourth Amendment rights.

This Court has stated that police conduct predicated upon on-the-spot observations is not subject to the Warrant Clause of the Fourth Amendment and does not require probable cause to arrest. Instead, such conduct "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." In assessing the reasonableness of such conduct, "it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' Camara v. Municipal Court, 387 U.S. 523, 534-535, 536-537, 18 L.Ed.2d 930, 938-940, 87 S.Ct. 1727 (1967)." *Terry* v. *Ohio*, 392 U.S. 1, 20-22 (1968). Considering the governmental interest in crime prevention and detection, this Court has recognized that a police officer

may, in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior though there is no probable cause to make an arrest. *See Terry* v. *Ohio, supra,* 392 U.S. at 22; *Adams* v. *Williams,* 407 U.S. 143, 145 (1972); *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 881 (1975).

The dissenting opinion adopted by the New York Court of Appeals failed to consider the governmental interest in public safety and crime prevention in evaluating the reasonableness of the officer's intrusion to investigate the two men he saw crouched behind a car in a public parking lot, holding objects which might be weapons. It ignored the public interest in having police investigate persons lurking behind cars in parking lots without apparent legitimate reason and the fact that if the officer in this case had failed to investigate, the safety of others entering the parking lot would have been in jeopardy. It also failed to consider the reasonable inferences which the officer was entitled to draw from his observations in light of his experience. Equating a founded suspicion of criminal activity with probable cause to arrest, that opinion relied upon standards of probable cause in determining the reasonableness of the officer's actions, and while acknowledging that "the arresting officer's life may well have been at stake, especially if he had failed to take the precaution of having his gun in hand when he ordered the defendant to 'freeze,' " concluded that the seizure and search of the respondent, Robert Earl, without probable cause, violated his constitutionally protected Fourth Amendment rights (Appendix C, p. A14).

This Court has not specifically decided whether it is reasonable for a police officer to draw his gun and seize

a person without probable cause to arrest. However, it has acknowledged that in the course of police investigation, "a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime" and that, in such instances "reliance on cases which have worked out standards of reasonableness with regard to 'seizures' constituting arrests and search incident thereto is * * * misplaced." It has concluded that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. Beck v. Ohio, 379 U.S. 89, 91, 13 L. Ed.2d 142, 145, 85 S.Ct. 223 (1964); Brinegar v. United States, 338 U.S. 160, 174-176, 93 L. Ed. 1879, 1889-1891, 69 S.Ct. 1302 (1949); Stacey v. Emery, 97 U.S. 642, 645, 24 L. Ed. 1035, 1036 (1878)." *Terry* v. *Ohio, supra,* 392 U.S. at 26-27. The officer in this case was warranted in the circumstances in believing that his safety and that of others was in danger and the investigative seizure with gun drawn did not violate Fourth Amendment rights, notwithstanding the absence of probable cause.

By requiring probable cause to arrest before a police officer can draw his gun and seize a person suspected of criminal activity, the decision adopted by the New York Court of Appeals imposed the restrictions of the Warrant

Clause of the Fourth Amendment upon police conduct which this Court has held to be subject only to the Fourth Amendment's general proscription against unreasonable searches and seizures. The ruling of the New York Court of Appeals is subject to review by this Court for it imposed greater restrictions on police activity by reason of the Fourth Amendment than those which this Court has held to be necessary and thereby deprived the prosecution of otherwise relevant evidence. *See Oregon* v. *Hass,* 420 U.S. 714 (1975). It should be reviewed for it conflicts with the public interest by unreasonably limiting and endangering police officers in the exercise of their duty to protect the public and prevent crime.

2. If the seizure of Robert Earl by the officer violated the Fourth Amendment, the New York Court of Appeals nevertheless improperly excluded from evidence the gun displayed by Robert Earl before he was seized by the officer.

In the area of the applicability of the Fourth Amendment's protection, it has been acknowledged that "each case must be judged on its own particular facts." *Lewis* v. *United States,* 385 U.S. 206, 212 (1966). The gun which was excluded from evidence as seized in violation of the Fourth Amendment had been voluntarily displayed by Robert Earl before he was seized by the officer. One of the factors which impelled the officer, after entering the parking lot, to make an investigatory seizure of Earl and his companion, was the object in Earl's upraised hand; although the officer could not then definitely identify it as a gun. Earl dropped this object, the gun, during the officer's investigative seizure and it was retrieved by the officer.

"What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area * * *" *Hoffa* v. *United States,* 385 U.S. 293, 301 (1966). The illegally possessed gun was knowingly exposed by Earl in an area accessible to the public and therefore should not be a subject of Fourth Amendment protection. *See Katz* v. *United States,* 389 U.S. 347, 351-352 (1967). The investigative seizure merely permitted the officer to safely enter an area of the public parking lot where he could clearly see the object displayed by Earl and identify it as a gun. Earl's own action and not the seizure revealed the gun. *Cf., Wong Sun* v. *United States,* 371 U.S. 471 (1963). The ruling of the New York Court of Appeals which excluded from evidence the gun abandoned by Robert Earl during the investigative seizure by Officer Carter, as seized in violation of the Fourth Amendment, should be reviewed by this Court, for it deprived the State of otherwise relevant evidence as the result of an improper application of the protection afforded by the Fourth Amendment. *See California* v. *Green,* 399 U.S. 149 (1970).

Conclusion

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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District Attorney
Queens County
Attorney for Petitioner

ANNAMARIE POLICRITI
Assistant District Attorney

February, 1977

APPENDIX A

Order of the Supreme Court of the State of New York

At a Criminal Term, Part V, of the Supreme Court, held in and for the County of Queens, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, New York, on the 9 day of September 1974.

Present:

Hon. FRANCIS X. SMITH, Justice.

Ind. No. 1541/74

Oral Motion to suppress evidence.

Hearing September 9, 1974.

THE PEOPLE OF THE STATE OF NEW YORK

against

ROBERT EARL,

Defendant.

William J. Gallagher, Esq.
For the Motion

Nicholas Ferraro, D. A.
Opposed

Upon the foregoing papers, and for the reasons stated on the record, after a hearing, the motion to suppress evidence is denied.

GRANTED:

Date: September 9, 1974

/s/ JOHN J. DURANTE

/s/ FRANCIS X. SMITH

J.S.C.

APPENDIX B

Majority and Dissenting Opinions of the Appellate Division of the State of New York

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

December 29, 1975

RABIN, Acting P.J., HOPKINS, MARTUSCELLO, CHRIST and SHAPIRO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

ROBERT EARL,

Appellant.

APPEAL from a judgment of the Supreme Court, Queens County (FRANCIS X. SMITH, J.), rendered October 9, 1974, convicting defendant of possession of weapons and dangerous instruments and appliances as a misdemeanor, upon his plea of guilty, and imposing sentence. The appeal also brings on for review a decision of the same court, rendered September 9, 1974, which denied defendant's motion to suppress physical evidence.

William E. Hellerstein and William J. Gallagher, New York, N. Y. (Elliot Schnapp of counsel), for appellant.

Nicholas Ferraro, District Attorney, Kew Gardens, N. Y. (Annamarie Policriti of counsel), for respondent.

Appendix B

MARTUSCELLO, J. Shortly after midnight on the morning of September 13, 1970, Patrolman Jesse Carter, an off-duty New York City Housing Authority policeman, was driving home from the movies with a female companion, when he observed the defendant and another "crouched" behind a parked automobile in a partially deserted parking lot in the South Jamaica section of Queens. Although his vision was partly obscured by the parked car, Carter stated that he could see the "whole upper part" of the defendant's body, and that the defendant was holding an object in his hands. He further stated that the defendant's companion was holding an object in his hands as well, which the latter thereafter placed in his rear pants pocket. The officer admitted candidly that he did not know what either object was at the time.

Continuing around the corner, Carter entered the lot, turned off his lights, and parked in a parking space two car-lengths away. He then paused for a "brief moment", turned on his headlights, and drove towards the two men. Halting the car, he exited briskly, identified himself as a police officer, and ordered the defendant to "freeze". The foregoing was accomplished with his pistol already drawn. As the defendant rose up from his crouched position, Carter observed him drop something to the ground, which Carter later retrieved and found to be a loaded handgun. The defendant was thereafter informed that he was under arrest and was searched. Six additional bullets were found in that search; a search of the companion revealed a second handgun.

A motion to suppress the physical evidence was denied by the Criminal Term, whereupon the defendant elected to

plead guilty. He now seeks a reversal of his conviction, alleging, as the sole ground therefor, that the evidence was unlawfully obtained by reason of an illegal seizure. This contention cannot be sustained.

In light of the recent holding of our Court of Appeals in *People* v. *Cantor* (36 NY2d 106), it can no longer be seriously contended that the defendant's gunpoint detention was anything less than a "seizure" within the meaning of the Fourth Amendment, as he was unquestionably, from that moment forward, significantly deprived of his freedom of movement as a direct result of official police action (*People* v. *Cantor, supra,* p. 111; see, also, *Terry* v. *Ohio,* 392 US1). This being the case, it follows *ex necessitate* that the legality of the seizure, and perforce the admissibility of the evidence derived therefrom, must depend ultimately upon the presence of probable cause for the detention, or, in the alternative, "whether it fits within the narrow exception carved out by the Supreme Court in *Terry* v. *Ohio* (392 US 1) and *Adams* v. *Williams* (407 US 143) where forcible street encounters were found to have been properly initiated by the police and reasonable under the circumstances" (*People* v. *Cantor, supra,* p. 110). Here, as in *People* v. *Cantor,* reliance upon probable cause has been disclaimed; hence the question presented is whether, under the facts of this case, the conduct of the police was otherwise "justified at its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible (*Terry* v. *Ohio, supra,* at p. 19; *Cupp* v. *Murphy,* 412 US 291; *People* v. *Kuhn,* 33 NY2d 203)" (*People* v. *Cantor, supra,* p. 111). This, in

turn, requires us to weigh carefully "the government's interest in the detection and apprehension of criminals against the encroachment involved with respect to an individual's right to privacy and personal security (*Terry* v. *Ohio, supra; Camara* v. *Municipal Ct.,* 387 US 523)" (*People* v. *Cantor, supra,* p. 111; see, also, *United States* v. *Ward,* 488 F2d 162, 168). We now embark upon this task, eschewing, as per the cautionary language of the Court of Appeals, the semantic trap of attempting to label the particular police action.

> "The proscription against unreasonable searches and seizures is designed to prevent random, unjustified interference with private citizens whether it is denominated an arrest, investigatory detention, or field interrogation (*Davis* v. *Mississippi,* 394 US 721; *Cupp* v. *Murphy,* 412 US 291, *supra;* see, generally, La Fave, Arrest: The Decision to Take a Suspect into Custody; Reich, Police Questioning of Law Abiding Citizens, 75 Yale L.J. 1161). • • • Whenever a street encounter amounts to a seizure it must pass constitutional muster" (*People* v. *Cantor, supra,* p. 112).

Discounting the existence of probable cause, the authority of the police in New York to intercept persons on the public street is derived from two independent sources: the so-called stop and frisk law (CPL 140.50) and the common-law right of inquiry (see *People* v. *Rivera,* 14 NY2d 441, cert. den. 379 US 978). Pursuant to statute, in order for a person to be lawfully detained in a public place, it is necessary that the detaining officer harbor a "reasonable suspicion" that such person is committing, has committed, or is about to commit a crime, and, when used in

this context, "reasonable suspicion" has been defined as that quantum of knowledge which, under the circumstances then present, would prompt an ordinarily prudent and cautious man to believe that criminal activity is at hand (*People* v. *Cantor, supra,* pp. 112-113). Vague or unparticularized hunches will not suffice for this purpose; nor will good will on the part of the police (see *Terry* v. *Ohio, supra*). What is required, according to recent decisions, are "specific and articulable facts which, along with any logical deductions [therefrom], reasonably [prompt the given] • • • intrusion" (*People* v. *Cantor, supra,* p. 113).

By way of contrast, the common-law right of inquiry is not so strictly proscribed; it operates to permit lawful detentive inquiry upon grounds less compelling than "reasonable suspicion" (see *People* v. *Rosemond,* 26 NY2d 101, 104). As was stated by the Court of Appeals in *People* v. *Rivera* (14 NY2d 441, 444-445, cert. den. 379 US 978, *supra*):

> "The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off" (see, also, *People* v. *Peters,* 18 NY2d 238, 242-243, affd. sub. nom. *Sibron* v. *New York,* 392 US 40).

Nevertheless, it is still clear that such authority cannot operate as a license to violate the Constitution; the common-law right of inquiry does not include the right to unlawfully seize. To quote again from *People* v. *Cantor* (p. 114):

> "The minimum requirement for a lawful detentive stop is a founded suspicion that criminal activity is afoot (e.g., *United States* v. *Ward,* 488 F2d 162; *United States* v. *Bugarin-Casas,* 484 F2d 853, cert. den. 414 US 1136). Our court has consistently limited this power when it has been exercised solely on the basis of vague suspicion or as a means of harassment (see, e.g., *People* v. *Stokes,* 32 NY2d 202; *People* v. *Schanbarger,* 24 NY2d 288; *Sibron* v. *New York,* 392 US 40)" (accord, *People* v. *Buffolino,* 48 AD2d 904).

Applying the foregoing considerations to the case at bar, we are of the opinion that Patrolman Carter's actions were, at the minimum, justified under the common-law right of inquiry; he was clearly possessed of such information as would warrant a "founded suspicion" that criminal activity was "afoot". Thus, Carter was aware, by reason of his observation, of the presence of two unidentified men "crouched" behind a parked car in a practically-deserted parking lot in the South Jamaica section of Queens, and of the presence of "objects" in their hands. The hour was late, approximately 12:25 A.M. Although admittedly equivocal, and hence capable of innocent interpretation, the foregoing is precisely the sort of suspicious street conduct which should be investigated. In the absence of such investigation the cause of crime prevention may needlessly suffer (see *People* v. *Rivera, supra*). Plainly, we are not here dealing with that type of "random" or "unjustified" interference which was condemned in *People* v. *Cantor* (*supra*); nor are we dealing with a case of "vague suspi-

cion'' on the part of the police. What we have here is a situation wherein an officer, by reason of the hour, the location and the nature of the activity observed, came to harbor a ''founded suspicion'' that criminal activity was afoot, and acted reasonably to test that suspicion. While it may have been otherwise, given other details, the fact remains that under the circumstances of this case, the ''seizure'' was reasonable within the meaning of the Fourth Amendment; the government's interest in the prompt investigation of this caliber of unusual street conduct (and the consequent potential for the prevention of crime) must be held to take precedence over the undoubted (and initially temporary) encroachment of individual rights of privacy and personal security which necessarily results (see *People* v. *Cantor, supra,* p. 111).

We cannot, as the dissent has attempted to do, demean the quality of Carter's suspicion; nor do we fault his decision in drawing his gun. The facts observed were not, as has been suggested, equally consistent with changing a flat tire. The record fails to reveal those normal incidents of everyday life which we have come to associate with changing a tire (i.e., the raised or lopsided car, the bumper-jack, and the upraised trunk lid). Moreover, we would be loathe to hold that, in the absence of specific knowledge as to what objects the defendant and his companion were holding in their hands, a ''founded suspicion'' that criminal activity was ''afoot'' could not have arisen (see *United States* v. *Bugarin-Casas,* 484 F2d 853), or that by drawing his weapon, the officer converted an otherwise lawful detention into an illegal arrest (see *People* v. *Wiggins* [decided herewith]). The element of danger in such circumstances is

well-documented by the cases (see *Adams* v. *Williams,* 407 US 143, 146; *Terry* v. *Ohio,* 392 US 1, 24, *supra; People* v. *Rivera,* 14 NY2d 441, 446, cert. den. 379 US 978, *supra;* cf. CPL 140.50) and constitutes a factor which we can ill ignore. Thus, we are impelled to state clearly and for the record that the right of inquiry must be accompanied by a coordinate right to act reasonably to protect the officer and the public at large, and that, under the facts of this case, Carter's response to the situation was both reasonable and necessary to his personal well-being. Clearly, a lesser response by him may have rendered his own life forfeit. We do not believe that the Fourth Amendment's proscription against unreasonable searches and seizures requires officers in Carter's stead to risk their lives needlessly in the performance of their duty. Constitutionalism, at least in this context, does not require the sacrifice of natural rights.

RABIN, Acting P.J., HOPKINS and CHRIST, JJ., concur.

SHAPIRO, J. (dissenting). After the defendant's suppression motion was denied, he pled guilty to the crime of possession of weapons and dangerous instruments and appliances as a misdemeanor. This appeal involves an aspect of the agonizing problem which often troubles the courts, to wit, whether to allow a defendant whose guilt is clear to go unwhipped of justice because the arresting officer has breached his constitutionally protected rights against unreasonable searches and seizures.

Appendix B

THE FACTS

The defendant was arrested soon after midnight on September 13, 1970 by Jesse Carter, an off-duty New York City Housing Authority patrolman, who was in his private automobile and on his way home from the movies with a woman companion. As he was driving by an unfenced parking lot in Queens, he saw the defendant and another man, some 15 or 20 feet away, crouched behind an automobile parked in the partly deserted lot. Other cars were also parked in the lot. Although the car behind which the defendant and his companion were crouched was between them and Patrolman Carter, the officer could see the whole upper part of the defendant's body. Patrolman Carter testified that the defendant "had his hands up" and that he saw an object in his hands *but could not see what it was.* He also testified that he also saw the defendant's companion place an object into his rear pants pocket, but he did not know what that object was. Patrolman Carter then pulled his car into the parking lot, turned off his lights, and parked it almost two car-lengths away from the defendant and his companion. He then turned on his car headlights, drove his car right up to the defendant, stopped his car, and got out, facing the defendant. He had his pistol in his hand and said "freeze, police officer", and told the defendant to place his hands on his, Carter's, car. He testified that when he did this he still did not know what the object was that he had seen in the defendant's hand. He then testified that he thereafter saw the defendant drop the object in his hand to the ground. When he retrieved it,

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Patrolman Carter found it to be a loaded gun. He then searched the defendant and found six additional bullets in his pocket.

THE DECISION UNDER REVIEW

The Criminal Term, in denying the defendant's suppression motion, ruled that Patrolman Carter was properly investigating the suspicious activities of the defendant and his companion when he approached them and identified himself to them as a police officer. It went on to say that, as he did so, the defendant dropped an object to the ground at his feet and that when Patrolman Carter picked it up he found it to be a loaded gun, as a result of which he arrested the defendant. The Criminal Term therefore found that the arrest of the defendant was proper and that, consequently, the ensuing search, which disclosed six more rounds of ammunition in the defendant's pocket, was also proper.

THE LAW

If the facts were as the Criminal Term stated them, that Patrolman Carter arrested the defendant only *after* he found that the object he had seen in the defendant's hand was, in fact, a gun, the correctness of its denial of the motion to suppress would be beyond question. However, Patrolman Carter's testimony was that when he turned on his headlights and limned the defendant in them and got out of his car, his gun in hand, and told the defendant, "freeze, police officer", he did so without knowledge that either the defendant or his companion were armed and that his only ground for thus proceeding was that he had

seen them crouching behind a parked car, the defendant with an unknown object in his hand. Clearly, therefore, at the moment that Patrolman Carter pointed his gun at the defendant and ordered him to "freeze", the latter was being "physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action" and he had therefore been "seized within the meaning of the Fourth Amendment" (*People* v. *Cantor,* 36 NY2d 106, 111). As the Court of Appeals there said (p. 111):

> "This is true whether a person submits to the authority of the badge or whether he succumbs to force."

Clearly, because of the police officer's gun and badge, the defendant was then "deprived of his freedom of movement" (*id.,* p. 111) and was under arrest at that very moment, a moment when the police officer as yet had no probable cause to believe that a crime was being committed.

In *People* v. *Cantor,* the court said (pp. 112-113):

> "Before a person may be stopped in a public place a police officer must have reasonable suspicion that such person is committing, has committed, or is about to commit a crime (CPL 140.50). Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand. (Compare Schwartz, Stop and Frisk: A Case Study in Judicial Control of the Police, 58 J. Crim. L.C. & P.S. 433, 445 with La Fave, 'Street Encounters' and the Constitution: Terry, Sibron, Peters and Beyond, 67 Mich. L. Rev. 40, 70.) To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion. Vague or unparticularized hunches will not suffice (*Terry* v. *Ohio,* 392 US 1, *supra; Wong Sun* v. *United States,* 371 US 471, 479). Nor will good faith on the part of the police be enough to validate an illegal interference with an individual (e.g., *Terry* v. *Ohio, supra; Henry* v. *United States,* 361 US 98, *supra; Hill* v. *California,* 401 US 797; *Smith* v. *County of Nassau,* 34 NY2d 18)."

Here, "the record is barren of any objective evidence evincing criminal activity" (*People* v. *Cantor, supra,* p. 113), for, at the time Carter arrested the defendant at gunpoint, he had no knowledge that the defendant's behavior was "dangerous to the safety of the police or others (*Warden* v. *Hayden,* 387 US 294)" (*People* v. *Cantor, supra,* p. 113). The officer frankly conceded that at the time when, gun in hand, he ordered the defendant to "freeze", he had no notion what the object in the defendant's hand was; nor did he know that it was a gun until he saw it at the defendant's feet.

In *Cantor* the court also said (pp. 113-114):

> "Turning to the common-law authority of the police to make investigative inquiries, we note that this authority does not give the police a license to violate the Constitution (cf. *People* v. *Rivera,* 14 NY2d 441, 448 [Fuld, Cr. J., dissenting]). The common-law power to inquire does not include the right to unlawfully seize. The minimum requirement for a lawful detentive stop is a founded suspicion that criminal activity is afoot (e.g., *United States* v. *Ward,* 488 F2d 162; *United States* v. *Bugarin-Casas,* 484 F2d 853, cert. den. 414 US 1136). Our court has consistently limited this power

> when it has been exercised solely on the basis of vague suspicion or as a means of harassment (see, e.g., *People* v. *Stokes*, 32 NY2d 202; *People* v. *Schanbarger*, 24 NY2d 288; *Sibron* v. *New York*, 392 US 40)."

Here, Patrolman Carter's testimony was that he saw the defendant and another man crouching behind a car and that the defendant had an object in his hand. Beyond that fact, Patrolman Carter had no ground for suspicion. The object might have been a tire iron for fixing a flat tire. By itself it was no basis for "a founded suspicion that criminal activity" was "afoot". The defendant and his companion took no evasive action when Patrolman Carter's car entered the lot and parked near them. In brief, Patrolman Carter had neither probable cause nor a founded suspicion of criminal activity afoot when he seized the defendant. Therefore, the motion to suppress should have been granted. I reach this conclusion with a great deal of reluctance since I am not unaware that cases such as the instant one raise serious problems for the courts, and even more serious ones for the police officers involved. Here, subsequent events demonstrated beyond the slightest doubt the correctness of the arresting officer's course of conduct. Had he failed to have his gun drawn and to order the defendant to "freeze", he might well have been a victim of the guns of his armed arrestees. However, constitutionally protected Fourth Amendment rights cannot be dispensed with solely because the results of an unreasonable search and seizure, made without probable cause, demonstrate that the person whose constitutional rights have been infringed was in fact armed with illegal weapons. The fact

that the subject of the improper search and seizure, the defendant, was in fact armed with a loaded weapon, and had extra ammunition for the weapon in his pocket, cannot serve to validate either his arrest without probable cause or the subsequent search of his person. While it goes against the grain to say to the arresting officer, whose life may well have been at stake, especially if he had failed to take the precaution of having his gun in hand when he ordered the defendant to freeze, that the fact that he acted on bald suspicion without sufficient prior evidence of the defendant's wrongdoing to constitute probable cause makes it necessary to suppress the product of the seizure and search, I must so vote. To do otherwise would be to fail to carry out my duty to support and defend the Constitution.

I am cognizant of the fact that both the highest court of our State and the Supreme Court of the United States have applied to police officers a somewhat different standard than that applied to ordinary citizens in determining what constitutes probable cause to sustain an arrest. In *Brinegar* v. *United States* (338 US 160, 175-176), Justice Rutledge said:

> "Since Marshall's time, * * * it [probable cause] has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States*, 267 US 132, 162.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

In *People* v. *Valentine* (17 NY2d 128), the court declared that the standard of probable cause, as it applies to police, is that which would be probable cause to a reasonable, cautious, prudent police officer.

Applying that statement here, I find that the arresting officer, based upon his own testimony, did not have, at any time prior to his arrest of the defendant, reasonable ground to believe that the defendant or his companion was armed or that they were otherwise engaged in any criminal activity. For all he knew, they may have been engaging in perfectly proper activity. He had no grounds for believing "criminal activity" was "at hand" (*People* v. *Cantor,* 36 NY2d 106, 113, *supra*). He did not "indicate specific and articulable facts which, along with any logical deductions, reasonably prompted" his intrusion on the defendant in a

public place (*id.,* p. 113). The fact that his hunch as to the defendant turned out to be right cannot serve to establish the necessary probable cause, although it did turn out to have secured his safety (see *Sibron* v. *New York,* 392 US 40, 63; *Henry* v. *United States,* 361 US 98, 103; *Johnson* v. *United States,* 333 US 10, 16-17). The law has not yet reached the stage where the proof of the pudding is in the eating.

As a court of law, we are bound to safeguard constitutionally protected rights against invasion when a police officer proceeds on no more than a "vague suspicion", even though the object of that invasion is a most despicable character. Our claim to uniqueness among the nations of the world is our deep commitment to constitutionalism which, in a case such as this, requires a recognition of and respect for individual rights and liberties. We may not traduce our principles because their observance results, in an individual case, in freeing a guilty defendant (cf. *People* v. *Sanchez,* —— NY2d — – [dec. Nov. 25, 1975]).

APPENDIX C

Decision of the Court of Appeals of the State of New York

Nov 18 1976

No. 488

The People &c.,

Respondent,

vs.

Robert Earl,

Appellant.

Order reversed and the indictment dismissed on the dissenting opinion by Mr. Justice J. Irwin Shapiro at the Appellate Division (50 A D 2d 289, 294-299).

All concur except Jasen and Cooke, JJ., who dissent and vote to affirm on the opinion by Mr. Justice M. Henry Martuscello at the Appellate Division (50 A D 2d 289, 290-294).

APPENDIX D

Judgment of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

No. 488

The People &c.,

Respondent,

vs.

Robert Earl,

Appellant.

The appellant in the above entitled appeal appeared by William E. Hellerstein and William J. Gallagher; the respondent appeared by Nicholas Ferraro, District Attorney, Queens County.

The Court, after due deliberation, orders and adjudges that the order is reversed and the indictment dismissed on the dissenting opinion by Mr. Justice J. Irwin Shapiro at the Appellate Division (50 A D 2d 289, 294-299). All concur except Jasen and Cooke, JJ., who dissent and vote to affirm

on the opinion by Mr. Justice M. Henry Martuscello at the Appellate Division (50 A D 2d 289, 290-294).

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 18, 1976.